SUPREME COURT, U. S.

FEB 12 1976

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1149

WILLIAM NELSON QUARLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner, WILLIAM NELSON QUARLES, prays that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals entered January 31, 1975, affirming his conviction under Title 22, Section 3204 of the Code of Laws for the District of Columbia, 1973 edition.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals was published in a slip opinion on December 31, 1975, the number being No. 8759.

The Superior Court of the District of Columbia was rendered on a jury verdict and no written opinion was entered.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on December 31, 1975. This Court has jurisdiction under 28 U.S.C.A. 1257 and the District of Columbia Reorganization Act, Public Law 91-358, July 29, 1970, 84 Stats. 478.

QUESTIONS PRESENTED

(1) Whether the trial court deprived the petitioner of his right to be present at every stage of the proceedings and of his right not to have exhibits not admitted into evidence by sending an exhibit not admitted into evidence out of the presence of the petitioner and without petitioner's knowledge.

(2) Whether the trial court erred in considering the Government's allocution before the petitioner exercised his right of allocution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) Title 23, Section 103 of the Code of Laws for the District of Columbia, 1974 edition, reads in pertinent part

> "The court also prior to imposing sentence shall afford counsel an opportunity to speak on behalf

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of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. At any time when the defendant or his counsel addresses the court on the sentence to be imposed, the prosecuting attorney shall, if he wishes, have an equivalent opportunity to address the court on the sentence to be imposed and to present information on his recommendation.

(4) Sixth Amendment of the Constitution of the United States

"In all criminal prosecutions, the accused shall enjoy the right to a speed and public trial."

STATEMENT OF THE CASE

The petitioner was charged with carrying a pistol without a license and two other charges of which he was acquitted. On January 19, 1974, members of the Metropolitan Police Department, D.C. executed a search warrant at 1016 Sixth Street, N.E., in the District of Columbia. Sgt. John P. Leonard testified at the trial on April 9, 1975, that he was Vice Coordinator, Fifth District Vice Unit. He entered the rear of the premises. He saw Petitioner and the other defendants, there being about fifteen people in the room. The defendant was bending over the radiator. The witness went directly to the radiator and retrieved a .38 caliber revolver and two white slips of paper. The witness did not know what the petitioner placed behind the radiator. The weapon was registered to another person. The petitioner had no license to carry a gun. There were no finger prints on the weapon.

When trial resumed on April 10, 1974, Officer Robert L. Dixon testified that he was engaged in Vice Enforcement with the Metropolitan Police Department, D.C., and was with the group executing a search warrant. The witness entered the rear door. Just before the witness entered the door, he saw the petitioner put a jacket in the trash can. He got the jacket out of the trash can and found a revolver and a packet in the pockets.

At the close of the Government's case, the court granted a motion for judgment of acquittal on maintaining a gambling establishment and denied the motion of the other charges.

The jury found the petitioner guilty.

It developed that an exhibit that was not admitted into evidence was sent to the jury by the clerk. It was a picture of rear of the premises looking into a room. Defense counsel moved for a mistrial. This motion was denied. A motion for a new trial was denied.

It developed that the Government sent the court a lengthy memorandum of the petitioner's background before sentence. The petitioner took the position that the Government can only allocute if and after the petitioner allocutes. If a defendant does not exercise his right to allocute, petitioner argued, the Government cannot. The court held that the Government can exercise its right to allocute regardless of the defendant's exercise of his right. The court obviously was influenced by the Government's allocution since she gave the petitioner a sentence of nine months imprisonment despite the fact that he had no record and probation had been recommended. The co-defendant was placed on probation.

REASONS FOR GRANTING THE WRIT

Briefly stated, there are two separate grounds for granting a writ of certiorari in this case.

First, the transmittal of an exhibit not in evidence denied the petitioner a constitutional right and introduced extraneous to the jury's deliberation.

Second, the exercise of allocution by the Government before the petitioner decided to exercise his right to allocute violated the petitioner's statutory rights.

SUMMARY OF ARGUMENT

I.

The court deprived the petitioner of his constitutional right by transmitting an exhibit not in evidence to the jury and doing it in absence of the petitioner or his counsel.

II.

The court deprived the petitioner his statutory right to allocute before the Government allocuted and denying his decision whether to allocute by allowing the Government to allocute first.

ARGUMENT

I.

The opinion of the District of Columbia Court of Appeals stated that the "proper standard for evaluating

appellant's claim of error is whether or not he suffered prejudice . . . " The petitioner submits that this is not the law. The precise issue raised by this petition was raised in *United States v. Adams*, 385 F.2d 546 (2 Cir., 1967). There the Court said:

> "But the principle that the jury may consider only matter that has been received in evidence is so fundamental that a breach of it should not be condoned if there is the slightest possibility that harm may have resulted."

Osborne v. United States, 351 F.2d 111 (8 Cir., 1965), deals with a grand jury transcript not in evidence being sent to the jury. The court held that this was prejudicial error and reversed.

Rogers v. United States, No. 6336, decided by this Court June 17, 1975, involved the trial court's communication without the knowledge of the petitioner or his counsel. There, in response to a jury's question about a recommendation of lieney, stated that the court would consider the jury's recommendation. Although the question was not argued or briefed, the court sua sponte raised the question and reversed. Cf. *Shields v. United States*, 273 U.S. 583 (1927).

We have no way of knowing how the unadmitted exhibit affected the jury's deliberations and should not speculate. The accused shall enjoy a speedy and public trial. It is not necessary to show prejudice for a reversal of a conviction not had in public proceedings. See Justice Brennan dissenting in *Levine v. United States*, 362 U.S. 610, 627n, 80 S. Ct. 1038, 1048 (1960). Cf. *Fina v. United States*, 46 F.2d 643, 644 (10 Cir., 1931); *Starr v. United States*, 105 U.S. App. D.C. 91, 95, 264 F.2d 377, 381 (1958).

This Court has held that it is not always necessary to show prejudice. In *Estes v. State of Texas*, 381 U.S. 540, 85 S. Ct. 1628 (1965), publicity via television was involved. This Court said

> "It is true that in most cases involving claims of due prejudice deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process" (Citation omitted).

In *Blackburn v. State of Alabama*, 361 U.S. 274, 80 S. Ct. 199 (1960) this Court said

> "It is established that the Fourteenth Amendment forbids 'fundamental unfairness in the use of evidence whether true or false.' (Citation omitted). Consequently we have rejected the argument that introduction of an involuntary confession is immaterial where other evidence establishes guilt or corroborates the confession." Cf. *Rideau v. State of Louisiana*, 373 U.S. 723, 83 S. Ct. 1417 (1963).

II.

Title XXIII, Section 103 of the Code of Laws for the District of Columbia, 1974 edition, reads in pertinent part as follows:

> "The court also prior to imposing sentence shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. *At any time when the defendant or his counsel addresses* the court on the sentence to be imposed, the

> *prosecuting attorney shall, if he wishes have an equivalent opportunity to address the court* on the sentence to be imposed and to present information on his recommendation."

The District of Columbia Court of Appeals cited the legislative history to justify the right to allocute on the part of the Government regardless of the defendant's exercise of his right. The legislative history does not support that right. On pages 7 and 8 of its slip opinion the court quotes Mr. Santarelli, the architect of this legislation. However, Mr. Santarelli does not espouse what the court said.

> MR. SANTARELLI. The Federal Rules of Criminal Procedure are silent on the Government's right to allocute prior to sentence, and the practice varies from district to district. Our view is that the Government has a definite role to play in the sentencing process *and that it should refute any misstatements made by the defendant or his counsel,* and to make recommendations concerning the sentencing.

The use of the word "refute" indicates that the defendant has to make a statement before there is anything to refute.

In the case at bar the Government sent the court a lengthy memorandum full of unverified information regarding the petitioner before sentence and before petitioner exercised his right to allocute. This memorandum said that the petitioner was number two man in the biggest numbers operation in the District which operation involved $100,000 a week. It denied that the petitioner was an interior decorator. It spoke of a recent trial involving bribery although the petitioner was not involved in the trial. It asked for the petitioner's incarceration.

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Perhaps it is not surprising that no cases in point were found except the decision in this case. The wording of the statute is plain.

CONCLUSION

In view of the foregoing argument, the petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 8759

WILLIAM NELSON QUARLES, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Argued June 18, 1975 Decided December 31, 1975)

William A. Borders, Jr. for appellant.

Gerard F. Treanor, Jr., Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry, James F. McMullin, Bernard J. Panetta, II* and *Joseph F. McSorley*, Assistant United States Attorneys, were on the brief, for appellee.

Before REILLY, *Chief Judge*, and KELLY and HARRIS, *Associate Judges*.

KELLY, *Associate Judge*: Appellant was apprehended during the execution of a search warrant at an after-hours club and charged with carrying a pistol without a license [1] because he was seen to secrete a loaded .38 caliber revolver behind a radiator during the raid. Upon

[1] D.C. Code 1973, § 22-3204.

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conviction appellant was sentenced to nine months in prison and fined $1,000. There are two contentions on appeal: that appellant's separate motions for a mistrial and for a new trial, based upon the allegedly erroneous transmission of an unadmitted exhibit to the jury, were improperly denied; and that the trial court's consideration of a lengthy sentencing memorandum submitted to it by the government before sentence was error.

I

Several photographs of the building in which appellant was arrested were admitted in evidence at trial. One, showing the back entrance to the building with the door open and a trash can inside, was not admitted. Nevertheless, this photograph was transmitted to the jury along with four others properly in evidence following a jury request to see the exhibits. The deputy clerk later stated he had not checked to see which of the exhibits had been admitted before sending the exhibits to the jury.

We understand appellant's contention to be that his right of presence at trial guaranteed by the Fifth Amendment as well as Super. Ct. Cr. R. 43 was abrogated because the transmission of exhibits was a communication between court and jury which took place in his absence.[2] He cites the recent case of *Rogers v. United States*, 422 U.S. 35 (1975), to support the view that where such right has been denied, it is unnecessary to show prejudice to obtain a reversal.[3] The government

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[2] Appellant also raises a subsidiary claim of denial of his Sixth Amendment right to a public trial, a claim we find to be without merit.

[3] A violation of a Rule 43 right may be harmless error, *Rogers v. United States*, *supra* at 40, but a violation of a con-

acknowledges that the transmittal of the photograph was error but does not address the constitutional issue. It merely asserts that appellant is not entitled to a new trial because he suffered no prejudice by reason of the admitted error.

Dallago v. United States, 138 U.S.App.D.C. 276, 427 F.2d 546 (1969), governs the disposition of appellant's claim. There, in considering an erroneous submission to the jury of portions of Securities and Exchange Commission files in a prosecution for violations of the Securities Act of 1933 and the Securities Exchange Act of 1934, the circuit court held that the transmission of items in evidence is a ministerial activity which can be delegated by the trial court. It held further that the transmission of the questioned items was not "a stage of the trial" within the meaning of FED. R. CRIM. P. 43, so that the defendant's presence was not required by that rule.

In our judgment, there was no communication whatsoever in the transmittal of the instant exhibits between the court and the jury.[4] As the *Dallago* court pointed out,

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stitutional due process right of presence may not. *Miller v. United States*, D.C.App., 250 A.2d 573, 575-76 (1969); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Snyder v. Massachusetts*, 291 U.S. 97, 107-08 (1934), *overruled on other grounds, Malloy v. Hogan*, 378 U.S. 1 (1964).

[4] The case of *Rogers v. United States, supra* at 39, is thus inapposite, since it deals with actual communication (by note) between the judge and jury. In *Rogers* the Supreme Court reversed a conviction for making threats to harm the President on the ground, raised sua sponte, that the judge had given the jury instructions without the defendant being present. *See also United States v. Adams*, 385 F.2d 548, 550 (2d Cir. 1967) in which, although defense counsel was present, a judgment of conviction for selling cocaine was reversed because the trial judge knowingly caused writings not admitted in evidence to be transmitted to the jury at their request and over counsel's objection.

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"at some time prior to the verdict, [the jurors] are entitled to examine the documents admitted in evidence" and unless there are unusual circumstances present, such as a large and unwieldy mass of material, or unless counsel requests, neither his presence nor that of the defendant is required. *Dallago v. United States*, *supra* at 283, 427 F.2d at 553. Similar considerations—the ministerial nature of the activity and the lack of unusual circumstances —lead us here to conclude that appellant had no Fifth Amendment right to be present when the requested exhibits were transmitted to the jury. Consequently, no such right could have been violated by the procedure utilized.

The proper standard for evaluating appellant's claim of error is whether or not he suffered prejudice as a result of the events that occurred.

> [T]he principle that the jury may consider only matter that has been received in evidence is so fundamental that a breach of it should not be condoned if there is the slightest possibility that harm could have resulted. . . . [Citations omitted.] [*United States v. Adams*, 385 F.2d 548, 550-51 (2d Cir. 1967).]

If the judgment of the jury was substantially swayed by the erroneous transmittal of exhibits, then a reversal is required. *Dallago v. United States*, *supra* at 290, 427 F.2d at 560.

We have carefully examined the record before us and have concluded that the unadmitted photograph could have had no such effect on the jury. The interior of the back entranceway and the location of the trash can had been a matter of dispute with regard to a codefendant who had been accused of stuffing a jacket with a gun and narcotics in the pockets in the trash can. In con-

trast, appellant was first sighted and subsequently arrested in a "kitchen area" of the building which was reached only after going through the rear door and an enclosed porch. At the hearing on the motion for new trial, defense counsel stated that he had not put that photograph in evidence "because one of the disputed problems in the case was whether or not the coat was put in the trash can at the back door. . . ." Thus, as to appellant's case, the photograph was simply irrelevant.[5]

II

Two days before sentencing, the prosecution submitted to the trial judge and to defense counsel a memorandum which described appellant as a prominent figure in the District's largest numbers operation. The memorandum stated that appellant had fifteen previous arrests (no convictions) including several for gambling violations. The information concerning appellant's gambling ties was obtained from two reliable informants who had personal knowledge of appellant's activities. Additionally, a special agent of the F.B.I. who for the past five years had investigated gambling in the District, submitted an affidavit stating that six confidential sources had at different times identified appellant as an active participant in the District's largest gambling operation.[6] The memorandum, noting the proclivity of gamblers to carry weapons and

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[5] *Accord, United States v. Yoppolo*, 435 F.2d 625, 627 (6th Cir. 1970) [transcripts of grand jury testimony used by the defense in cross-examining government witnesses, not received in evidence, and inadvertently transmitted to the jury resulted in no prejudice to defendants.]

[6] The memorandum did not disclose the identity of either the informants or the confidential sources but it did contain statements regarding the reliability of both.

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to use them, urged the court to impose the maximum penalties of a year's confinement and a $1,000 fine.[7]

At sentencing appellant's counsel vigorously objected to the prosecutor's memorandum and opposed any further oral allocution. Counsel argued before the trial judge and now argues on appeal that D.C. Code 1973, § 23-103 does not permit allocution by the prosecutor unless and until the defendant has made a statement at sentencing. The trial judge after examining the statute rejected this interpretation. The appellant made no statement and his counsel's remarks were limited to protesting the propriety of the prosecution's allocution. The trial judge sentenced appellant to nine months in jail and imposed a $1,000 fine. She commented that for a first offender with no previous convictions a suspended sentence would normally be imposed; however, due to the prosecution's allocution, a harsher sentence was appropriate.

At issue is whether at sentencing the government may allocute if a defendant chooses not to make a statement. D.C. Code 1973, § 23-103 provides that:

> Before imposing sentence the court may disclose to the defendant's counsel and to the prosecuting attorney, but not to one and not the other, all or part of any pre-sentencing report submitted to the court in the case. The court also prior to imposing sentence shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. *At any time when the defendant or his counsel addresses the court on*

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[7] *See* D.C. Code 1973, §§ 22-3204, 22-3215.

> *the sentence to be imposed, the prosecuting attorney shall, if he wishes, have an equivalent opportunity to address the court and to make a recommendation to the court on the sentence to be imposed and to present information in support of his recommendation.* Such information as the defendant or his counsel or the prosecuting attorney may present shall at all times be subject to the applicable rules of mutual discovery. . . . (Emphasis added.)

A superficial reading of this language would appear to support appellant's contention. However, an examination of both the prior court practice and the legislative history of the statute precludes such an interpretation. Before passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970,[8] the prevailing practice at sentencing was to permit the defendant to present mitigating information or to make a statement to the court but to prohibit the prosecution from rebutting the defendant or from presenting any recommendation on sentencing.[9] The legislative history is quite clear as to the Congressional intent to permit active participation by the prosecution in the sentencing process. The testimony on this specific section includes the following dialogue:

> MR. SANTARELLI. The Federal Rules of Criminal Procedure are silent on the Government's right to allocution prior to sentence, and the practice varies from district to district. Our view is that the Government has a definite

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[8] Pub. L. No. 91-358 (July 29, 1970), 84 Stat. 473.

[9] Rauh and Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of* 1970, 20 AM. U. L. REV. 252, 334-35 (1970-1971).

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role to play in the sentencing process, and that it should be able to refute any misstatements made by the defendant or his counsel, and to make recommendations concerning sentencing.

MR. ABERNETHY. Do you mean it cannot use the views of the prosecutor?

MR. SANTARELLI. No statute prohibits it, but it is not done in practice. There has developed something in this District, a tradition not sanctioned by statute, that the courts do not allow the prosecution to be heard at the time of allocution.

MR. ABERNETHY. What do you write into this reorganization act?

MR. SANTARELLI. We provide that the court shall hear the prosecution if the prosecution wishes to be heard at the time of sentencing, where a very important decision is made.

MR. ABERNETHY. All right.[10]

This section had a further purpose of preventing ex parte representations by defense counsel to the trial judge concerning sentencing. The words "[a]t any time when the defendant or his counsel addresses the court on the sentence to be imposed . . .", were intended not to limit or condition the government's right to allocute on a prior representation by defendant but rather to assure an opportunity for the government to present its views on sentencing whenever the defense counsel chose to sub-

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[10] *Hearings on H.R.* 13689 *and H.R.* 12854 *Before Subcomms. Nos. 1 and 3 of the Comm. on the District of Columbia,* 91st Cong., 1st Sess. 27 (1969).

mit information to the sentencing judge.[11] Appellant's suggested statutory interpretation is in direct conflict with Congress' intent to both preserve the defendant's right to allocute and to assure the government an active role in the sentencing procedure.

The judgment on appeal is

Affirmed.

[11] Rauh and Silbert, *supra* note 9, suggest that frequently representations were made by defense counsel to a judge in chambers without participation by the prosecution. The statute now prohibits such a practice.

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